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No. 04-100

In the

Supreme Court of the United States

MARSHA SEIBER and ALVIN SEIBER

Petitioners,

v.

UNITED STATES

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Is the Takings Clause violated when the government commandeers the use of 40 acres of trees to provide habitat for a spotted owl?

(2) Does it matter that the owners did not lose the ability to use the trees on other property they owned?

(3) Should this taking be analyzed as a physical invasion or a regulatory taking?

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties.[1] Pacific Legal Foundation attorneys have represented property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and Pacific Legal Foundation has participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 30 years.

This amicus brief will urge this Court to grant review in order to resolve the conflict over the degree to which government may take discrete interests in private property and avoid the duty to pay just compensation because the owner retains other discrete interests. This case can also resolve the important question of whether government programs that protect animal habitat should be judged by a standard applicable to physical invasions or regulatory takings. Amicus Pacific Legal Foundation believes that it can add insight as to why this case presents an excellent vehicle for resolving these issues.

Counsel for petitioner and respondent have consented to the filing of this brief. Letters of consent are filed with the Clerk of this Court.

INTRODUCTION AND SUMMARY

Once again landowners come to this Court seeking clarification in matters of Takings Clause jurisprudence that

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

continue to bedevil the state and lower federal courts, a state of conflict that leaves landowners and regulators alike without clear direction. The facts of this case are simple: by denying a landowner an Incidental Take Permit, the government denied a landowner the assurance that he would not be prosecuted for violating the Endangered Species Act if he cut trees near a spotted owl nest. In essence, the government commandeered 40 acres of trees for the public purpose of preserving spotted owl habitat. While the facts are obvious enough, the law affecting this case is anything but simple.

What, if anything, has been taken? The law is not settled over whether the object of the takings analysis should be: (1) just the trees on these 40 acres (2) the trees plus the underlying ground on these 40 acres, or (3) trees and the underlying ground on these 40 acres *plus* another 160 acres owned by the Seibers but not expropriated by the government for habitat preservation.

By what standard should this taking be judged? Is the government-sanctioned imposition of protected owl habitat on these 40 acres equivalent in nature to other physical invasions, such as those where other nongovernmental entities or objects are permitted to occupy private property? The state and lower federal courts have not determined whether there is a distinction between those cases where a landowner must refrain from using property (as in a zoning or typical permit denial case) and those cases where the property is actually being utilized for a direct governmental purpose (as with a lake behind a dam or a nest for a protected species of animal.)

The remainder of this brief will explain why this Court should accept the Petition for Writ of Certiorari to answer these questions.

ARGUMENT

I

THERE IS NO CONSENSUS IN THE STATE AND LOWER FEDERAL COURTS AS TO HOW THE RELEVANT PARCEL SHOULD BE DEFINED

A key question here is what is the relevant parcel or object of the takings inquiry? There are three choices: (1) the specific interest in property used by the government (the trees on 40 acres of land) to preserve owl habitat, (2) all the property used by the government (40 acres of trees plus the underlying ground), or (3) all the property used by the government plus all other contiguous property owned by the same owner (200 acres of trees plus the underlying ground). There is no consensus of opinion in the state and lower federal courts on this question.

Suppose that the government came upon 40 acres of the Seibers' property and cut and removed all the trees and sold them for profit. There is no question that the government would be liable to the Seibers for the tort of conversion. *Restatement (Second) Torts* § 223. The government's liability in such a case dates back at least to the Magna Carta. "No constable or other bailiff of ours [the King] shall take the corn, or other chattels of any one except he straightway give money for them."[2] There is also no question that the government would be liable regardless of how much other timber the Seibers might own elsewhere.

Suppose instead that the government came onto 40 acres of the Seibers' property, cut the trees, but left them on the ground for chipmunk habitat and prohibited the Seibers from

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[2] Ernest F. Henderson, *Select Historical Documents of the Middle Ages* (Stubb's Charters trans.), *in The Constitution of the United States of America and the Constitution of the State of California* 6 (California State Senate 1993-1994).

moving the trees, making the underlying land useless for all purposes. Again, there should be no question that there is liability. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (describing classes of categorical takings). The government would still be liable for the conversion of the trees. *Restatement (Second) Torts* §§ 223, 226. But it also would be liable for the taking of the underlying property. Again, the government's liability for the conversion is independent of how much other timber the Seibers might own elsewhere. But, as will be shown, there is wide disagreement on whether the taking of the underlying property is somehow ameliorated if the Seibers own other timberland that is not burdened by the government action.

Finally, suppose that the government came on the same 40 acres and marked all the trees as protected property not to be touched so that they can be used only for owl habitat. Because of the prevalence of trees on the property, the underlying ground cannot be used. In this case, it is doubtful that the tort of conversion would apply because the government has not altered or destroyed the trees. But there is a strong argument that the trees and the underlying land have been taken. (The theory under which there has been a taking will be discussed in Part II, *infra*.) What is especially not clear, however, is to what extent the Seibers' ownership of other timber and other land should affect the finding of a taking of the Seibers' trees and land. To the Seibers, of course, the results in all three scenarios are nearly the same. They cannot use their trees in any of the scenarios and they cannot use their land in the latter two. Yet, in the last scenario, where they have been injured *more* than in the first scenario (losing the use of both the trees and the land), they may be the least likely in some courts to receive compensation simply because they own other property not affected by the regulations.

The state of affairs where the more one owns the more government can take, without paying just compensation, has

troubled this Court and has confused the state and lower federal courts. In *Palazzolo v. Rhode Island*, 533 U.S. 606, this Court wrote: "Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, . . . but we have at times expressed discomfort with the logic of this rule . . . a sentiment echoed by some commentators." *Id.* at 631. Because the issue of the relevant parcel had not been previously raised in *Palazzolo*, this Court did not contemplate it further. The present case, however, provides a good opportunity for this Court to revisit the question of the relevant parcel. And, considering the degree to which confusion has reigned in the state and lower federal courts, it is an issue worthy today of this Court's consideration.

There are two aspects of the relevant parcel question at issue in this case. First, there is the matter of whether the trees can be treated separately from the surface estate for purposes of a takings analysis. Second, because the Seibers own timberland outside the affected 40 acre spotted owl nest site, was it appropriate for the court to suggest that the entire 200 acres they owned should be considered to be the relevant parcel? Petitioners focus on the first of these questions, arguing that the affected trees should be the focus of the takings inquiry. The Federal Circuit below, however, felt that it did not need to determine whether the trees should be treated as a separate estate, because "[t]he Seibers have never alleged that their timber on the entire two hundred-acre parcel was rendered valueless." Opinion, Pet. App. at 22a. Thus, the Seibers focused on just the trees, the court focused on everything the Seibers owned in the vicinity, and neither the Seibers nor the court below chose to focus on the 40 acres of trees plus the 40 acres of land on which the trees grew. The proper choice among these alternatives is not obvious because there is no uniformity in the lower courts. Had the law been more clear,

then the Seibers and the court would have been able to determine more easily the appropriate denominator.

A. Some State and Federal Courts Focus on the Property Affected by a Prohibitory Regulation

In *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) (*Florida Rock I*), the Federal Circuit Court of Appeals was confronted by a single 1,560-acre parcel subject to the Corps of Engineers' restrictions. The landowner argued that all 1,560 acres of its wetland mining property had been taken after a permit to mine 98 acres was denied. 791 F.2d at 895-96, 904-05. The government argued that there was ***no*** taking because the use of only 98 acres had been denied—leaving the "parcel as a whole" largely unaffected by the denial. *Id.* at 904. The Federal Circuit rejected both arguments, holding that (1) it would be unfair to the government to award compensation for the 1,462 acres for which the applicant had no immediate plans, *id.* at 904-05, and (2) the court would focus on only the 98 acres to see if there had been a taking. *Id.* at 904.

Several years after *Florida Rock I*, the Federal Circuit responded to the government's new argument that the takings denominator should include more than the mineral rights and surface resources needed for mining. The court disagreed:

> By taking some portion of Florida Rock's economic use of the property—its power to disturb the overlying wetlands, and with it the common law property right to mine its subsurface minerals—the Government appears to have destroyed part of the value of Florida Rock's holdings.

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560, 1572 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) (*Florida Rock IV*). The court noted that in appropriate circumstances a subset of the bundle of rights can be taken

through inverse condemnation. *See id.* at 1572 n.32. *See also Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991) (court rejected the government's suggestion that there was no taking because the coal owner could farm about half of its property. The mineral estate was a significant enough separate interest in property to be considered the denominator.).

In a case strikingly similar to the one now before this Court, in *Boise Cascade Corp. v. Board of Forestry*, 935 P.2d 411 (Or. 1997), a landowner was prohibited from logging 56 acres on a 64-acre tract because of a spotted owl nest. The Oregon Supreme Court held that the landowner could state a claim for a regulatory taking under the Oregon and United States constitutions. *Id.* at 415-16. Thus the court segregated the 56 acres of owl habitat from the remaining 8 acres of harvestable timber and considered the timber on the 56 acres to be the relevant parcel. As recently described by the Oregon Court of Appeals, while "the Oregon courts have not been exactly generous in their explanations, they at least have been consistent in their treatment of the whole parcel rule. In a nutshell, they have effectively rejected it." *Coast Range Conifers, LLC v. State of Oregon,* 189 Or. App. 531, 546 (Or. App. 2003). For the Federal Circuit to have rejected a claim very similar to those arising in *Boise Cascade* and *Coast Range Conifers* points out the doctrinal inconsistency that needs clarification from this Court.

In *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998 (Ohio 2002), a coal mining company sought just compensation for a taking after some of its coal reserves were declared unsuitable for mining because of their proximity to a watershed. The Ohio Supreme Court held first that the relevant parcel in vertical context was the coal deposit. The court also excluded from consideration coal outside the protected area and held that the owner suffered a categorical taking under *Lucas.*

The Ninth Circuit and New York Court of Appeals have similarly defined the relevant parcel in accordance to the property actually regulated. *See American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981) (separating out property in accordance to how it was zoned, relying on the government's regulatory segregation of property to define the relevant parcel); *accord Kaiser Development Co. v. City and County of Honolulu*, 649 F. Supp. 926, 947-48 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990) ("Most importantly, the City has treated Queen's Beach separately for zoning and planning purposes. . . . [U]nder the facts of this case, Queen's Beach is to be considered a separate parcel for the purposes of determining whether there has been a taking."); *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1067 (N.Y. 1989) ("[T]he permanent abrogation of one of those rights, without regard to its comparative value in relation to the whole, may well be sufficient to constitute a taking."); *accord Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (finding the destruction of a reversionary interest to be a regulatory taking).

In all of these cases, the courts took a decidedly different approach than the one followed below. But the court below is not alone. Unfortunately, as shown next, there are a number of courts which insist on defining the relevant parcel very broadly, and in doing so they deny compensation for the taking of substantial interests in property.

B. Some Courts Focus on All the Contiguous Property an Owner May Have in Defining the Relevant Parcel

As noted above the Federal Circuit in *Whitney Benefits* focused on the mineral estate that was affected by the prohibition on mining. The Federal Circuit, however, has not been particularly consistent in its approach for analyzing the relevant parcel. In *Forest Properties, Inc. v. United States*, 177

F.3d 1360, 1365 (Fed. Cir. 1999), the Federal Circuit joined together a regulated wetland portion of the owner's development with an unregulated upland parcel for purposes of a takings analysis. And, of course, in the present case it rejected the Seibers' claim because it preferred to focus not just on the 40 acres where the owl-based prohibition lay, but on all of the Seibers' 200 acres.

Similarly, in *Rith Energy v. United States*, 270 F.3d 1347 (Fed. Cir. 2001), the Federal Circuit defined the relevant parcel to be all coal, both that which could not be mined after the government prohibited further mining and the coal that had already been mined.

The Tenth Circuit in *Clajon Production Corp. v. Petera*, 70 F.3d 1566 (10th Cir. 1995), expressly rejected the *Florida Rock IV* holding. *Clajon* involved an attempt to bring a takings challenge to hunting regulations in Wyoming that limited wild game licenses sold to hunters from out-of-state. The plaintiff, who derived income from out-of-state hunters, complained that this was a taking of a property right in hunting. 70 F.3d at 1577. In ruling against the rancher, the Tenth Circuit expressly rejected the Federal Circuit's language in *Florida Rock IV* that it can be appropriate to focus on the property interest actually taken:

> However, we believe that the relevant denominator must be derived from the entire bundle of rights associated with the parcel of land. . . . Thus, we reject the *Florida Rock* approach.

Id. (citations omitted).

Finally, the Pennsylvania Supreme Court, in a decision inconsistent with the Ohio Supreme Court's holding in *RTG*, ruled in *Machipongo Land & Coal Co. v. Dep't of Envtl. Protection*, 799 A.2d 751 (Pa. 2002), that the relevant parcel in

a takings analysis could consist of other coal reserves located outside of the protected watershed.

C. Contrary to Guidance from This Court, Some Courts Have Even Combined Discrete Parcels in Analyzing the Relevant Parcel

In *Lucas*, this Court expressly rejected as "extreme" and "unsupportable" the notion advocated by the New York Court of Appeal in *Penn Central Transportation Co. v. City of New York*, 366 N.E.2d 1271, 1276-77 (N.Y. 1977),

> where the state court examined the diminution in a particular parcel's value . . . in light of total value of the takings claimant's other holdings in the vicinity.

Lucas, 505 U.S. at 1016 n.7. There is a logical incongruity in the notion that owners of lots of property should be treated worse than owners of only a small amount of property. Nevertheless, some courts have found that the ownership of other interests in property potentially diminishes the impact on a regulated interest in property.

The Michigan Supreme Court in *K & K Construction, Inc. v. Department of Natural Resources*, 575 N.W.2d 531 (Mich.), *cert. denied*, 525 U.S. 819 (1998), combined a 55-acre parcel with two other parcels of 16 and 3.4 acres for purposes of determining whether there was a taking. The court reasoned that the parcels were owned in whole or in part by the same owner of the 55-acre parcel and that there was a unified plan of development. The same reasoning was followed in *Volkema v. Department of Natural Resources*, 542 N.W.2d 282 (Mich. Ct. App. 1995), *cert. denied*, 525 U.S. 1040 (1998).

The Michigan example was also followed in *Karam v. New Jersey Department of Environmental Protection*, 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998), *aff'd by adopting appellate opinion*, 723 A.2d 943 (N.J.), *cert. denied*, 528 U.S. 814 (1999). In *Karam*, the appellate court examined the history

of a lot comprised of an upland and wetland unit and found the two portions to be a single unit for a takings analysis.

These cases all follow the logic of the notion that this court rejected in *Lucas*: The more real property one owns, the more the government can take without having to pay for it. Professor Eagle has criticized this approach, calling it "conceptual agglomeration" in opposition to the idea of "conceptual severance" that this Court rejected in *Tahoe-Sierra.* Steven J. Eagle, *Regulatory Takings* § 11-7(b)(2) (2d ed. 2001). *See also* John E. Fee, *Of Parcels and Property,, in Takings Sides on Takings Issues: Public and Private Perspectives* (Thomas Roberts, ed. 2002), § 5.1 at 103 (discussing principle of conceptual agglomeration).

There is no uniformity to how courts decide how much of an owner's property to consider when deciding how much value has been destroyed by government regulation. Only this Court can provide some measure of consistency and guidance.[3]

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[3] Moreover, the nature of this taking—as a physical invasion by the owls of the trees of the Seiber's property—makes the focus on the discrete interests in the property taken all the more compelling. As this Court explained in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), physical invasion takings can occur even if other property is unaffected and even if the taking is temporary:

> When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and

(continued...)

II

THE COURT CAN RESOLVE THE QUESTION OF WHETHER A TAKING IN WHICH GOVERNMENT COMMANDEERS PROPERTY FOR USE BY OWLS IS A PHYSICAL INVASION

The Seibers assert that the government's commandeering of their property in order to provide a nesting site for a pair of spotted owls is the physical invasion of their property.

The scenarios described at the beginning of this brief's argument demonstrate the transition from an absolute conversion of property, compensable under theories of tort, to government action that is not compensable in tort but nonetheless has an equally devastating impact on the use and value of the property. It was to provide fairness and justice in this circumstance that this Court first articulated the concept of a physical invasion taking in *Pumpelly v. Green Bay & Mississippi Canal Company*, 80 U.S. 166 (1871). There, this Court noted

> if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law,

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[3] (...continued)
the government occupies the property for its own purposes, even though that use is temporary.

Id. at 233.

> instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

Id. at 177-78.

To be sure, the physical invasion in *Pumpelly's* reservoir was more tangible than forest land commandeered to play host to a pair of nesting spotted owls. So too, is the concept of "public use" which has come to mean not an actual occupation by members of the public as with a road, post office, or public works project, but more of a project that promotes the a legislatively determined "public purpose." *See, e.g., Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) (The "public use requirement is thus coterminous with the scope of a sovereign's police powers.") This evolving view of "public use" is consistent with the view that taking can occur when private property is commandeered to serve a larger public good–even when there is no direct appropriation. As this Court continued in *Pumpelly*, "there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken." 80 U.S. at 181.

A. The Issue and the Lower Court's Ruling

In *Yee v. City of Escondido*, 503 U.S. 519 (1992), this Court explained that government effects a physical taking whenever "it requires the landowner to submit to the physical occupation of his land." 503 U.S. at 527. To rephrase the point, a physical taking occurs whenever the government deprives a property owner of his "right to exclude," a right that is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.* at 528 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). In

either formulation, it is the "element of required acquiescence [that] is at the heart of the concept of occupation." *Id.* at 527 (quoting *FCC v. Florida Power Corp.*, 480 U.S. 245, 252 (1987)). Indeed, this Court recently noted the obvious point that this required acquiescence is often effected by means of regulation: where "regulations . . . require the [property owner] to suffer the physical occupation of a portion of his building," they will be analyzed not as regulatory takings but rather as physical takings. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 323 n.18 (2002) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)).

In the present case, the Seibers alleged in their inverse condemnation complaint that the effect of the government's regulations was to "impose[] a servitude upon their property requiring the merchantable timber to be left standing so it can occupied as a northern spotted owl nesting site." Pet. App. at 57a, ¶ 9. In brief, the Seibers alleged that the government required them to submit to the physical occupation of their land by spotted owls. Or, to frame the allegation in other pertinent terms, the government deprived the Seibers of the right to exclude the owls from their property and instead required them to acquiesce in the owls' presence on their land. In so alleging, the Seibers successfully stated a claim for a categorical taking by physical occupation under this Court's precedents.

Without in any manner questioning the accuracy of the Seibers' allegations concerning the effect of the government's actions, the Federal Circuit rejected the Seibers' physical occupation claim, saying only that "regulatory restrictions on the use of property do not constitute physical takings." Opinion, Pet. App. at 16a. The court based this assertion on a citation to *Tahoe-Sierra*. Pet. App. at 16a (citing *Tahoe-Sierra*, 535 U.S. at 303). This Court in *Tahoe-Sierra*, however, was noting only that "[t]he longstanding distinction between physical and regulatory takings makes it inappropriate to treat precedent

from one as controlling on the other." 535 U.S. at 303. It was *not* providing any guidance on whether a regulation of this sort—where a landowner must involuntarily acquiesce to an occupation of his property—is a physical or regulatory taking.

The court below also relied on one of its own precedents, *Boise Cascade v. United States*, 296 F.3d 1339 (Fed. Cir. 2002) for the proposition that "the government protection of owls . . . is not comparable to a government authorization to third parties to utilize property." Specifically, the court in *Boise Cascade* held that

> between a government authorizing or conducting a physical invasion of the property of another and a government regulating what one may do with property due to the random or incidental location of a natural resource or wild animal on the property. The state has no control over where spotted owls choose to nest.

296 F.3d at 1354. But, this assertion is inconsistent with prior decisions of this Court.

B. The Conflict with This Court

In *Kaiser Aetna*, the property owners converted a privately owned lagoon into a marina, thereby connecting the lagoon to a publicly owned bay; subsequently, the United States sought "an injunction to require [the owners] to allow public access" to the waters of the marina on the ground that it had become subject to the federal "navigational servitude." 444 U.S. at 169. Having ruled that "Congress could assure the public a free right of access to the [waters of the marina] if it so chose," *id* at 174, this Court went on to consider whether Congress could do so "without invoking its eminent domain power and paying just compensation," *id*. at 180. The Court emphatically ruled that Congress could not, because "the imposition of the navigational servitude in this context will result in an *actual physical*

invasion of the privately owned marina." *Id.* (emphasis added). Here, as in the present case, the government has "no control" of where or when boaters [or owls] may decide to utilize the property. The key is not that the government was protecting the waterway, but that it forced the landowner to acquiesce in the use of that waterway by others.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, is similar. In that case, "New York law provide[d] that a landlord must permit a cable television company to install its cable facilities upon his property." *Id.* at 421. This Court concluded that "such a physical occupation of property is a taking." *Id.* As in the present case, this case involved more than the mere regulation of apartment rooftops and cable. Instead, the Court characterized the case as one in which the government's regulations "require[d] the landlord to suffer the physical occupation of a portion of his building by a third party." *Id.* at 440 (emphasis added); *accord Florida Power Corp.*, 480 U.S. at 252 (quoting same); *Tahoe-Sierra*, 535 U.S. at 323, n.18 (quoting same). Also relevant to the present case, it is crucial to recognize that the New York City government did not "cause or induce" the cable company to occupy the property of the landlord and has "no control" over that activity.

In *Nollan v. California Coastal Commission*, 483 U.S. 831, this Court held that had the government "required the [property owners] to make an easement across their beachfront available to the public on a permanent basis . . ., we have no doubt there would have been a taking." The Court reached this conclusion even though that property would have been periodically occupied not by the government, but by random members of the beachgoing public:

> In Loretto we observed that where governmental action results in "a permanent physical occupation" of the property, by the government itself or by others, "our cases uniformly have found a taking to

> the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."

Id. at 831-32 (emphasis added and citations omitted) (quoting *Loretto*, 458 U.S. at 432-35). *Nollan* therefore confirms that physical occupations may be effected "by the government itself or by others." This again is not a case merely where the government is regulating so that a landowner must refrain from use–but both *Nollan* and the present case the government would require the owner to allow the property to be put to a public use; by trespassers or by owls—in a way that substantially interferes with the owner's use and enjoyment of the property.

Finally, in *Brown v. Legal Foundation of Washington,* 538 U.S. 216, this Court found a physical invasion when funds belonging to legal clients was involuntarily transferred to the Legal Foundation of Washington. This Court noted that "the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in Loretto." *Id.* at 235. Here, the occupation of the treetops has the same result and should be treated as a physical invasion.

C. The Conflict with Other Lower Courts

The decision in *Seiber* also conflicts with decision of the Eleventh and D.C. Circuit Courts of Appeals. In *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), the Eleventh Circuit concluded that the Pole Attachment Act[4] "effects a [physical] taking of a utility's property." *Id.* at 1328. (citation omitted). The explicit nature of the conflict is clear when it is recalled that the court below held that requiring property owners to acquiesce in the presence of the owls did not

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[4] 47 U.S.C. § 224(f)(1) (provides that a public utility company must provide access to a cable television or telecommunications carriers with nondiscriminatory access to poles, conduits, or right-of-ways.)

effect a physical occupation because the government was simply protecting the owls, or in the words of the case it cited for authority, merely "regulating what one may do with property," *Boise Cascade,* 296 F.3d at 1354. The Eleventh Circuit confronted a similar argument—"the mandatory access provision [is] a *simple regulatory condition*"—and quickly rejected it as "meritless." *Gulf Power Co.*, 187 F.3d at 1330 (emphasis added). "Characterizing the mandatory access provision as a regulatory condition," concluded the court, "cannot change the fact that it effects a taking by requiring a utility to submit to a permanent, physical occupation of its property." *Id.* at 1331.

More generally, the "power to regulate [property] does not extend to taking without just compensation the right of a [property owner] to exclude unwanted occupiers of its property." *Id.* As the Eleventh Circuit observed, among other arguments this Court rejected in *Loretto* "was the argument that the statute was merely a 'permissible regulation of the use of real property.' . . . [A]lthough property is subject to broad regulatory power, a regulation becomes a taking when the government authorizes permanent, physical occupation by a third party." *Id.* at 1328 (quoting *Loretto*, 458 U.S. at 439-40).

Similarly, in *Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 1441, 1443 (D.C. Cir. 1994), the D.C. Circuit addressed a "physical co-location" access scheme under which local telephone exchange companies are required to "set aside a portion of their central offices for occupation and use by competitive access providers." *Id.* at 1443. The D.C. Circuit concluded that the scheme "directly implicates the Just Compensation Clause of the Fifth Amendment, under which a 'permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.'" *Id.* at 1445 (quoting *Loretto*, 458 U.S. at 426).

Like the Eleventh Circuit's decision in *Gulf Power*, the D.C. Circuit's decision in *Bell Atlantic* cannot be squared with *Seiber*.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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